



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of Claims Against the Dealer Bond  
of Pete's Budget Center, Inc.

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Case No.: TR-01-0048

**FINAL DECISION**

On September 18, 2001, David M. Frederick filed a claim with the Wisconsin Department of Transportation (Department) against the motor vehicle dealer bond of Pete's Budget Center, Inc. The claim along with documents gathered by the Department in its investigation of the claim was referred to the Division of Hearings and Appeals. A Preliminary Determination based on the documentation contained in the file and required by Wis. Admin. Code, § Trans 140.26(4)(a) was issued on November 21, 2001. On November 28, 2001, Mr. Frederick filed an objection to the Preliminary Determination pursuant to Wis. Admin. Code § Trans 140.26(5)(b). Pursuant to due notice a hearing under Wis. Admin. Code § Trans 140.26(6) was conducted in this matter on December 20, 2001, in Fond du Lac, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c) the PARTIES to this proceeding are certified as follows:

David M. Frederick  
87 8<sup>th</sup> Street  
Fond du Lac, WI 54935

Pete's Budget Center, Inc., by  
Pete Frank, Sr.,  
271 North Main Street  
Fond du Lac, WI 54935

Auto-Owners Insurance Company  
P. O. Box 30660  
Lansing, MI 48909

The Preliminary Determination issued in this matter found that the Dealer's failure to accurately disclose the mileage of the subject vehicle constituted a violation of Wis. Admin. Code § Trans 139.04(6)2 and that this act of the Dealer resulted in a loss to Mr. Frederick in the amount of \$781.58, the cost to Mr. Frederick of repairs to the vehicle reasonably related to the

violation. At the hearing, the Dealer admitted that Mr. Frederick paid him an additional \$300.00 for repairs for which no receipts were given to Mr. Frederick. At this point, Mr. Frederick would prefer for the Dealer to buy back the vehicle; however, as discussed in the decision, this is no longer feasible because of the damage to the vehicle resulting from the hit and run accident. After considering the evidence presented by the parties at the hearing in this matter, the only modification to the Preliminary Determination warranted is to increase the amount of the loss documented by Mr. Frederick by \$300.00. In all other respects the Preliminary Determination is adopted as the Final Decision in this matter.

### FINDINGS OF FACT

1. Pete's Budget Center, Inc., (Dealer) is a motor vehicle dealer licensed by the Wisconsin Department of Transportation pursuant to Wis. Stat. § 218.0111. The Dealer's facilities are located at 271 North Main Street, Fond du Lac, Wisconsin.
2. The Dealer had a surety bond satisfying the requirements of Wis. Stat. §218.0114(5)(a) in force from January 17, 2000 through May 20, 2001. (Bond #007723-61000551 from Auto-Owners Insurance Company.)
3. On May 2, 2000, David M. Frederick purchased a 1985 Ford Mustang, vehicle identification number 1FABP28M6FF109582, from the Dealer. Mr. Frederick paid \$4,266.00, including sales tax and registration fees, for the vehicle. On the Wisconsin Buyers Guide, the Dealer disclosed the vehicle mileage as 42,445 miles. The Dealer further indicated no problems with any of the components listed on the disclosure form and that all listed equipment was legal.
4. On the Wisconsin title and license application form (MV-11), the Dealer also listed the mileage of the vehicle as 42,445. On neither the Wisconsin Buyers Guide nor the MV-11 did the Dealer indicate that the disclosed odometer reading reflected the amount of mileage in excess of the odometer's mechanical limit or that the odometer reading was not the actual mileage of the vehicle.
5. Shortly after Mr. Frederick purchased the vehicle the engine overheated and he had to have the radiator replaced. A month later, Mr. Frederick experienced more problems with the vehicle and the Dealer installed a used "harmonic wheel balancer." The Dealer charged Mr. Frederick \$150.00 for each of these repairs. After another month, Mr. Frederick experienced more mechanical problems with the vehicle. He took the vehicle to the Dealer for service. The Dealer rebuilt the carburetor and replaced the rear main seal, the clutch, and the transmission. The total bill for these repairs was \$781.58.
6. On or about September 3, 2000, the engine of the vehicle "seized" and Mr. Frederick had the vehicle towed to the Dealer for repairs. The Dealer's mechanic told Mr. Frederick that the vehicle needed a new engine. Mr. Frederick did not have the engine replaced. Mr. Frederick obtained a history for the vehicle from Carfax and discovered that the vehicle's mileage was disclosed as 3,438 miles in 1996. Presumably the 1996 mileage was actually 103,438 and the mileage in 2000, when Mr. Frederick purchased the vehicle, was 142,445.

7. On November 20, 2000, Mr. Frederick filed a complaint against the Dealer with the Department of Transportation, Dealer Section (Dealer Section). The investigator from the Dealer Section obtained title histories for the vehicle from Illinois and Ohio. An Illinois application for title dated July 3, 1996, disclosed the odometer reading of the vehicle as 56,104 miles. Based on this investigation it is impossible to conclusively determine the actual mileage of the vehicle at the time it was purchased by Mr. Frederick. However, the mileage was clearly well in excess of the 42,445 disclosed by the Dealer.

8. The investigator communicated the results of his investigation to the Dealer and Mr. Frederick. The investigator negotiated a settlement of the claim. The terms of the settlement were that the Dealer agreed to repurchase the vehicle from Mr. Frederick for \$5,000.00. The \$5,000.00 repurchase price represents the original sale price of the vehicle (\$4,266.00) plus an additional amount to partially compensate Mr. Frederick for the cost of the repairs made to the vehicle. The Dealer and Mr. Frederick executed a settlement agreement, a copy of which was faxed to the investigator on June 7, 2001.

10. The vehicle remained on the Dealer's lot from the time it was towed there in September, 2000. However, the vehicle remained titled in Mr. Frederick's name. The Dealer and Mr. Frederick never completed the settlement agreement. On June 23, 2001, the vehicle was struck by a hit and run vehicle. The vehicle was extensively damaged on the right side. Mr. Frederick's father had already cancelled the insurance coverage on the vehicle and the Dealer's insurance will not cover the damage because the vehicle was not owned by the Dealer.

11. On September 18, 2001, Mr. Frederick filed a claim against the Dealer's surety bond. The amount of the claim listed on the claim form is \$1,081.58 for the cost of repairs made to the vehicle plus the cost of repairing the damage from the hit and run accident. Mr. Frederick supplied two estimates for repairing the accident damage. The estimates are \$3,250.40 and \$3,261.78. However, in a narrative attached to the bond claim form, Mr. Frederick requests \$4,200.00, the purchase price of the vehicle, plus \$1,800.00 interest.

12. The Dealer's disclosure of the mileage of this vehicle as 42,445 miles when no basis existed to believe that this was the actual mileage of the vehicle and, in fact, there is evidence that the mileage of the vehicle far exceeded the mileage disclosed constitutes a violation of Wis. Admin. Code § Trans 139.04(6)2. It is likely that Mr. Frederick would not have purchased the vehicle or would have negotiated a substantially lower price for the vehicle for the vehicle if the vehicle's mileage had been properly disclosed.

13. The Dealer's failure to accurately disclose the mileage of the vehicle constitutes a violation of Wis. Admin. Code § Trans 139.04(6)2. A violation of Wis. Admin. Code § Trans 139.04(6)2 is, in turn, a violation of Wis. Stat. §218.0116(1)(bm) and/or (gm). Mr. Frederick did suffer a loss as the result of the violation. Mr. Frederick's loss is the difference in value between the vehicle he purchased in the condition disclosed by the Dealer (i.e. a 1985 Mustang with only 42,445 miles) and the vehicle he actually purchased (a 1985 Mustang with presumably 142,445 miles). There is presently no evidence in the file upon which to make such a calculation. A reasonable alternative method to calculate Mr. Frederick's loss would be to assume that the

various mechanical problems he experienced after he purchased the vehicle are not characteristic for a 1985 Mustang with only 42,445 miles and that he should be awarded the cost of the necessary repairs to the vehicle. Mr. Frederick has supplied documentation of \$1081.58 he paid for repairs to the vehicle.<sup>1</sup>

14. The bond claim was filed within three years of the ending date of the period the Auto-Owners Insurance Company Capitol Indemnity Corporation bond was in effect and is, therefore, a timely claim.

15. David M. Frederick has sustained a loss as the result of an act of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license. David M. Frederick has submitted documentation to support a claim in the amount of \$1081.58. Accordingly, this amount of the claim is allowable.

### DISCUSSION

The procedure for determining claims against dealer bonds is set forth at Wis. Admin. Code Chapter Trans 140, Subchapter II. Wis. Admin. Code § Trans 140.21(1) provides in relevant part:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01(3)(a) 1. to 14., 18. to 21., 25. or 27. to 31., Stats. [*recodified as §§ 218.0116(1)(a) to (gm), (im) to (k), (m), and (n) to (p) in Wis. Stats., (1999-2000)*].

. . .

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

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<sup>1</sup> The cost of replacing the "seized" engine could also possibly be included in the claim, but no estimate for this work has been filed.

Accordingly, to allow the claim, a finding must be made that the Dealer violated one of the sections of Wis. Stat. § 218.0116(1), identified in Wis. Admin. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed. The Dealer failed to accurately disclose the mileage of the vehicle. Since the vehicle was more than ten years old at the time it was sold by the Dealer, it was exempt from the mileage disclosure requirement pursuant to Wis. Admin. Code § Trans 154.05(3). However, in this case the Dealer chose to make a mileage disclosure, even though based on the history of the vehicle it is likely that the vehicle's actual mileage was far in excess of the mileage disclosed by the Dealer. The Dealer's failure to accurately disclose the mileage of the vehicle constitutes a violation of Wis. Admin. Code § Trans 139.04(6)2.

Mr. Frederick did suffer a loss as the result of the violation. However, it is difficult to determine the amount of loss sustained by Mr. Frederick. There are two alternative methods of calculating the loss in disclosure violation cases. One method is to award the claimant the difference between the value of the vehicle as disclosed (i.e. in this case a 1985 Mustang with 42,445 miles) and the value of the vehicle actually purchased (a 1985 Mustang with approximately 142,445 miles). In this case, both these values are unknown, so there is no basis to calculate the claim. A reasonable alternate method to calculate the difference between the value of the vehicle as disclosed by the Dealer and the vehicle actually purchased by Mr. Frederick is to compensate Mr. Frederick for the cost of the repairs necessary to bring the vehicle up to the condition represented by the Dealer. Mr. Frederick has the burden to document the amount of his claim. He has been awarded the amount of the repair costs that he has been able to document.

Another alternative remedy for disclosure violation cases is to undo the transaction. The Dealer would buy back the vehicle from Mr. Frederick for the original purchase price of the vehicle plus the costs of necessary repairs to the vehicle less an allowance for Mr. Frederick's use of the vehicle. (Mr. Frederick indicated he drove the vehicle approximately 7,000 miles.) This is essentially the settlement negotiated by the investigator from the Dealer Section. However, this alternative is no longer feasible because of the damage to the vehicle resulting from the hit and run accident. It is unreasonable to order the Dealer to buy the vehicle back from Mr. Frederick at the original purchase price after the vehicle has sustained \$3,250.40 in body damage.

The hit and run accident occurred after Mr. Frederick and the Dealer had negotiated a settlement pursuant to which the Dealer agreed to buy the vehicle back from Mr. Frederick. However, the hit and run accident occurred before Mr. Frederick signed the vehicle title over to the Dealer. At the time the hit and run accident occurred the vehicle was still owned by Mr. Frederick, but in the possession of the Dealer. Apparently the vehicle had been in the possession of the Dealer since September of 2000. Mr. Frederick had the vehicle towed to the Dealer's lot for repairs after the engine "seized." Accordingly, the Dealer was in possession of the vehicle as a bailee. A bailee only owes a duty to exercise ordinary care as to property entrusted to its care. Fireman's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 N.W. 507 (1912). According to the police report, the vehicle was legally parked at the time of the hit and run accident. There is no indication that the accident was the result of the Dealer's negligence. The Dealer is not liable for the damage to the vehicle as the result of the hit and run accident.

Finally, as part of his bond claim, Mr. Frederick requests \$1,800.00 he claims he paid in interest on the money he borrowed to purchase the vehicle. Mr. Frederick has not provided any documentation for the amount of interest he has paid. Regardless, pursuant to Wis. Admin. Code § Trans 140.21(2)(e), interest is expressly disallowed as part of a bond claim. The portion of the bond claim Mr. Frederick requests as reimbursement for the interest he has paid on the loan must be denied.

#### CONCLUSIONS OF LAW

1. David M. Frederick's claim arose on May 2, 2000, the date he purchased a vehicle from of Pete Frank, Sr., d/b/a Pete's Budget Center. The surety bond issued to of Pete's Budget Center, Inc., by Auto-Owners Insurance Company was in effect at this time. The claim arose during the period covered by the surety bond.

2. David M. Frederick filed a claim against the motor vehicle dealer bond of Pete's Budget Center, Inc., on September 18, 2001. The bond claim was filed within three years of the last day of the period covered by the surety bond. Pursuant to Wis. Admin. Code § Trans 140.21(1)(d), the claim is timely.

3. David M. Frederick's loss was caused by an act of Pete's Budget Center, Inc., which would be grounds for suspension or revocation of its motor vehicle dealer license. David M. Frederick has submitted documentation to support a claim in the amount of \$1081.58. Pursuant to sec. Trans 140.21(1)(c), Wis. Adm. Code, this portion of the claim is allowable.

4. The Division of Hearings and Appeals has authority to issue the following order.

#### ORDER

The claim filed by David M. Frederick against the motor vehicle dealer bond of Pete's Budget Center, Inc., is APPROVED in the amount of \$1081.58. Auto-Owners Insurance Company shall pay David M. Frederick this amount for his loss attributable to the actions of Pete's Budget Center, Inc.

Dated at Madison, Wisconsin on January 15, 2002.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_

Mark J. Kaiser  
Administrative Law Judge

**NOTICE**

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.